IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-107

PETER PREISER, Commissioner of Correctional Services of the State of New York, and HAROLD N. BUTLER, Superintendent of Wallkill Correctional Facility,

Petitioners,

against

JAMES NEWKIRK,

Respondent.

BRIEF FOR PETITIONERS

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Opinions and Orders Below

The decision of the Court of Appeals for the Second Circuit is reported at 499 F. 2d 1214 (1974), and is reproduced in the petition for certiorari at page 21. The judgment of the United States District Court for the Southern District of New York, dated October 26, 1973, which was affirmed in part and modified in part by the Court of Appeals, is not reported, and is reproduced in the petition for certiorari at page 32. The opinion of the District Court is reported at 364 F. Supp. 497 (1973), and is reproduced in the petition for certiorari at page 34. The decision of the District Court, dated July 31, 1972, denying respondent's motion for a preliminary injunction, is not reported, and is reproduced in the petition for certiorari at page 45.

Jurisdiction

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1). The decision of the Court of Appeals was rendered on June 3, 1974. The petition for certiorari was filed on August 12, 1974. Certiorari was granted on October 21, 1974.

Statute and Regulations

New York Correction Law, § 23 (1974 Supp.):

> "1. The commissioner of correction shall have the power to transfer inmates from one correctional facility to another. Whenever the transfer of inmates from one correctional facility to another shall be ordered by the commissioner of correction, the superintendent of the facility from which the inmates are transferred shall take immediate steps to make the transfer. The transfer shall be in accordance with rules and regulations promulgated by the department for the safe delivery of such inmates to the designated facility."

New York Code of Rules and Regulations, Title 7, Part 57:

> "Section 57.1. Employees detailed to transfer prisoners from one institution to another, to court, to visit close relatives who are seriously ill, to attend funerals, or any other purpose, shall be held responsible for the safety and security of such inmates from the time they leave the institution until they arrive at their destination or until they are returned to the institution. Employees on this assignment shall be carefully selected and shall be men who can be relied upon to make proper decisions. When situations arise which are not covered by specific instructions, employees shall exercise their best judgment in view of their responsibility for the custody of the inmate and for the best interests of the department."

Questions Presented

1. Whether a prison inmate who is transferred within a state from a medium security institution to a maximum security instituiton, without the imposiiton of disciplinary punishment, is entitled under the Due Process Clause to notice of charges and an opportunity to be heard?

2. Whether the courts below correctly ruled that respondent's case was not moot, although respondent was retransferred to a medium security facility ten months prior to the District Court's decision, and faced no imminent likelihood of being transferred to another institution?

Statement of the Case

A. Prior Proceedings

This action was commenced by respondent James Newkirk, and two other New York State inmates, Cornelius Lucas and Carl Oliver, on July 5, 1972. Newkirk and his co-plaintiffs alleged that on June 8 and 9, 1972 they were transferred from Wallkill Correctional Facility, a medium security institution, to Clinton Correctional Facility and Auburn Correctional Facility, maximum security institutions, in violation of their rights under 42 U.S.C. § 1983. Plaintiffs alleged that they were transferred without an opportunity to be heard in violation of the Due Process Clause of the Fourteenth Amendment, and that they were entitled to written notice of charges, a right to call and confront witnesses, representation by counsel and a hearing before an impartial body. Plaintiffs also alleged that the "unexplained fact" of their transfers from medium to maximum security institutions would "adversely affect their chances for release on parole." (Complaint, p. 5, ¶ 6, annexed to Order to Show Cause, dated July 5, 1972). Plaintiffs sought a preliminary injunction ordering their re-

turn to Wallkill Correctional Facility pending further proceedings in the action.

On July 13, 1972 plaintiffs filed an amended complaint adding a fourth inmate, David Rodriguez. Plaintiffs alleged that Rodriguez, as well as Newkirk, Lucas and Oliver, had been improperly transferred from Wallkill Correctional Facility to maximum security institutions in violation of their rights under the Due Process Clause. Plaintiffs repeated the allegation that the unexplained fact of their summary transfers would adversely affect their chances for release on parole (Amended Complaint, p. 6, ¶ 17, filed July 13, 1972).

On July 31, 1972 the District Court (McLean, D.J.), denied plaintiffs' motion for a preliminary injunction. The District Court held that plaintiffs had not demonstrated a strong likelihood of ultimate success on the merits, and had not presented evidence of severe injury. The District Court stated that to grant plaintiffs preliminary relief would be to grant them substantially everything they could obtain if they were successful at trial. The District Court directed the parties to meet with the Court on September 6, 1972 to fix a date for trial. (See decision of July 31, 1972 at page 45 of the petition for certiorari).

On November 17, 1972, shortly before the trial commenced, plaintiffs filed another amended complaint on behalf of Newkirk, Lucas, Oliver and Rodriguez. Plaintiffs repeated their previous allegations that they had been transferred from Wallkill Correctional Facility to maximum security institutions, in violation of their rights under the Due Process Clause. However they added the contentions that they were denied the equal protection of the law by not being afforded the same administrative hearings that were afforded to inmates who faced disciplinary punishments, and that their First Amendment rights were chilled and their right of access to the courts diminished, by reason of their transfers. Once again plaintiffs alleged

that the unexplained fact of summary transfers would adversely affect their chances for release on parole, notwithstanding the fact that plaintiff Oliver was granted parole on September 6, 1972 and plaintiff Rodriguez was granted parole on October 19, 1972. (See second Amended Complaint, p. 8, ¶ 20, and defendants' Answer to Amended Complaint, p. 4, ¶ 11).

On November 27, 1972 trial was commenced before District Judge Robert J. Ward.* At the outset plaintiffs moved to dismiss the action as to Carl Oliver and David Rodriguez because they had been released on parole and their cases were moot. The District Court granted this motion without prejudice and without costs (Trial Minutes, p. 4). Thereafter the trial began and continued for three days. The District Court heard testimony from respondent Newkirk, his co-plaintiff Cornelius Lucas, and two other witnesses on their behalf. The Court also heard testimony from petitioner Harold Butler, and a witness on his behalf. At the close of the trial the District Court reserved decision, and the parties undertook to settle the case voluntarily.

Petitioner Butler agreed to the return of respondent Newkirk and Cornelius Lucas to Wallkill Correctional Facility directly from New York City, where the trial was held. The attorneys for both sides discussed the possibility of a consent decree, but no final agreement was reached on this issue. On December 18, 1972 respondent Newkirk was restored to his truck driving job at Wallkill, which was the position he held prior to his transfer, and on February 22, 1973 Cornelius Lucas was released from Wallkill on parole. As a result of these intervening events petitioner Butler moved on March 22, 1973 to have the entire case dismissed as moot. Respondent opposed this motion, and the District Court reserved decision.

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* District Judge McLean had died in the interim.

On October 9, 1973, approximately ten months after respondent Newkirk had been returned to Wallkill, the District Court rendered a decision granting declaratory relief on his behalf. The District Court held that the case of Cornelius Lucas was moot because he had been released on parole, and that respondent Newkirk's prayer for injunctive relief required dismissal because the threat of a transfer was not sufficiently great to warrant an injunction. However, notwithstanding the fact that there was "not a sufficiently delineated controversy" to merit the granting of injunctive relief, the District Court declared that respondent's rights were violated by not being informed of the rule violations which would result in a transfer from Wallkill to another institution. The Court directed that the prison authorities make known to respondent the scope of permissible behavior and the circumstances which in their judgment would warrant a transfer from Wallkill. (See petition for certiorari at pages 34-43; 364 F. Supp. at 499-504).

On October 26, 1973 the District Court issued its final judgment on respondent's behalf. The District Court ruled that respondent's interest in remaining at Wallkill was sufficiently great to require some sort of notice that his activities might result in a transfer, or at least the knowledge that a transfer was a possibility. The Court also ruled that the situation at Wallkill on June 8, 1972 did not present so clear and present a danger to the security of the prison as to justify a transfer without warning, and that transfers from Wallkill to maximum security institutions were used for disciplinary purposes.

The District Court declared that Newkirk could not be transferred without being afforded due process, including (a) prior notice of the rules of the institution and what acts on his part would lead to his being transferred; and (b) a hearing at which he was informed of the charges against him and afforded an opportunity to explain his behavior before a relatively impartial tribunal either prior to

the transfer or if prompt action is essential, as soon thereafter as practicable. (See Judgment of October 26, 1973 at pages 32-33 of the petition for certiorari). Thus, although eschewing injunctive relief in its decision, the District Court effectively enjoined petitioners from transferring respondent without the due process procedures set forth in the Court's order.

The judgment of the District Court was modified in part and affirmed in part by the Court of Appeals for the Second Circuit. In its decision of June 3, 1974 the Court of Appeals agreed with the lower court that an informal hearing was necessary to give respondent an opportunity to explain his activities, prior to a transfer to another institution. The Court of Appeals also held that the District Court's judgment satisfactorily prescribed the minimum due process to which respondent was entitled. However, the Court of Appeals ruled that it is was not necessary for the prison officials to give respondent notice of all future activities which would result in a transfer, and it modified the District Court's judgment to this extent. (See petition for certiorari at pages 21-31; 499 F. 2d 1214).

B. Facts of the Case

At the trial the following salient testimony was given by the parties and witnesses.

Respondent Newkirk testified that he had been a New York State prison inmate since his conviction for murder in the second degree in 1962 (5a). He stated that prior to his placement at Wallkill Correctional Facility he had been an inmate at Ossining Correctional Facility, Attica Correctional Facility, Green Haven Correctional Facility and Auburn Correctional Facility (5a, 7a, 31a)* He said that

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* All of these facilities were maximum security institutions at the time Newkirk was confined in them, and are located in different parts of New York State.

when he was transferred to Auburn Correctional Facility in 1968, he was eventually permitted to study some aspect of auto mechanics, but not the aspect he wished to study (8a).

He said that upon his transfer to Wallkill he was permitted to take instruction in auto mechanics, and later permitted to drive a truck and to leave the grounds in a truck (8a, 10a). He said he attended classes in mathematics, English and history, and also engaged in musical activities by playing in a band and practicing his musical instruments during his leisure time (9a, 13a). He said he was permitted to go about the institution on his own (13a).

Newkirk stated that on June 8, 1972 he was performing his usual truck driving duties, when he was ordered to report to the prison hospital, while his belongings were packed by the guards (29a-30a). He said he was then transported to Clinton Correctional Facility, a maximum security institution in another part of the State, without being advised of the reason for the transfer, and without being given an opporunity to be heard (30a). He admitted, however, that when he previously was transferred from one institution to another, no officials told him of the reason for the transfer (45a).

Newkirk said that when he was transferred from Wallkill to Clinton, he was not given an assignment in driving or auto mechanics, but he accepted an assignment to do housework in the Superintendent's residence. He said that no one forced him to accept this assignment, and that the residence was located outside the prison walls (11a, 34a). He said his wage was fifty-five cents per day, which was the same wage he earned as a truck driver at Wallkill (36a, 25a). He said he had requested a truck driving assignment upon his arrival at Clinton, but had not renewed his request because he believed he was on a waiting list (36a).

Newkirk further stated that he had permission to keep his musical instrument in his cell at Clinton, but because

of his long working hours he did not have time to practice it (37a). He said that he did not have access to as many recreational activities at Clinton as he had at Wallkill, and he was not able to pursue his interests in glass work, painting and stone ware, that he pursued at Wallkill. He also said that at Clinton he was not permitted to possess certain articles in his cell, such as a lamp or typewriter, which he possessed at Wallkill, and he was more limited in his access to showers and hot water, and visiting and telephone privileges (17a-19a, 21a).

Significantly, Newkirk acknowledged that he was not placed in disciplinary confinement upon his arrival at Clinton, and that he did not lose any good behavior allowances as a result of the transfer (37a, 44a). He further acknowledged that his transfers between other institutions prior to his placement at Wallkill, had resulted in a diminution of family visits (32a), and that his first assignments at Wallkill were to perform porter duties and to haul garbage, whereas his previous assignment at Auburn Correctional Facility was to repair automobiles (33a). He further stated that his initial wage rate at Wallkill was twenty-five cents per day, whereas his initial wage rate upon his transfer to Clinton was thirty cents per day (25a, 36a). He said that prior to coming to Wallkill he had studied mathematics, science and English at Auburn (33a).

Newkirk stated that during the period preceding his transfer from Wallkill he became interested in the concept of an inmate labor union, and signed a union constitution on May 31, 1972. He said that on June 2, 1972 another Wallkill inmate gave him a union petition to sign, and he did so, and passed it on to other inmates with instructions to return it to the inmate who gave it to him (23a, 26a). He said that later in the evening he heard an announcement over the public address system from a member of the inmate liaison committee, stating that the liaison committee had not sanctioned the union petition, and would meet with any inmates who wished to discuss the matter (27a). New-

kirk said that he did not become involved in any arguments, fights or threats over the union issue, and did not speak to any officers about it, and did not have further contact with authorization forms prior to his transfer from Wallkill on June 8, 1972 (28a-29a).

Coy Smith, a former Wallkill inmate, testified on Newkirk's behalf. Smith said that on June 2, 1972 he did not observe any unusual activity, but he recalled an announcement over the public address system by a member of the inmate liaison committee (Trial Minutes, 173). Smith remembered that the announcement stated that the inmate liaison committee was not responsible for the circulation of union petitions, and that the committee would meet with inmates at a designated place to answer questions about its position (T.M. 174).

Smith said that fifteen or twenty inmates met with the members of the liaison committee on that night (T.M. 178). Some inmates wanted to know why the committee was not supporting the union if the committee was supposed to represent the inmates, and one committee member was telling the inmates that the committee would support the union if it went through proper channels (T.M. 179). Smith said that there were no fights or threats; but that there was some heated discussions; and that the inmates were speaking in loud voices trying to outtalk each other (T.M. 179). He said that some inmates hollered back and forth, and some inmates did not like the way the inmate liaison committee member was answering questions (T.M. 190). He said the inmates were not angry about having signed the petition, but that some of them were confused about what they had signed and were fearful of administrative reprisals (T.M. 194; 146a).

Smith acknowledged that he had not been disciplined for signing a union constitution, and although petitioner Butler questioned him about it, no action was taken against him, and he was paroled in September, 1972 (T.M. 200).

Eugene Eisner, an attorney specializing in labor law, also testified on behalf of Newkirk. He described the steps that were being taken to place the union petition of the Wallkill inmates before the New York State Public Employees Relation Board (Trial Minutes, 338-350; 147a-151a).

Walter Dunbar, a former deputy commissioner of correctional services, testified on behalf of petitioners. Dunbar stated that his experience in the correctional field included being a corrections officer, a supervisor of a crime study commission in California, a training officer of all personnel in the California Department of Corrections, an associate warden, a deputy director and director of the California Corrections Department; a chairman and member of the United States Board of Parole, a past president of the American Correctional Association, an editor of the *Manual of Correctional Standards,* and a member of the United States Attorney General's task force for innovative grants to improve corrections (T.M. 367-68).

Dunbar said that there are a variety of reasons why an inmate may be transferred between correctional facilities. These include different quotas for different programs, an individual's adjustment to his assignment, critical information that indicates a danger to staff or personnel, and separation of inmates due to prior criminal experience together or hatred of one another (T.M. 370-71). He said that transfer decisions are made at the institutional level by the superintendent and the classification committee, and made at the departmental level by a director of clasification and movement (T.M. 372). He said that where transfers are necessitated by problem at institutions, a superintendent has the prerogative and responsibility to bring the matter to the attention of the correction department (T.M. 373). He said that a superintendent has an acute responsibility to insure the safe and secure operation of his institution, and this may include dangerous or recal-

citrant inmate behavior, homosexual triangles, the threat of violence between individuals, the threat of weapons being introduced, and other behavior which would disturb the order and stability of the institution (T.M. 373).

Dunbar further stated that giving advance notice to an inmate prior to a transfer might create a security problem, because the inmate might resist violently, and other inmates might attempt to assist him (T.M. 376-77). He said that conducting hearings would also create a problem because the revelation of confidential information leading to a transfer would be hazardous to the inmate or others (T.M. 378). As an example he intimated that a superintendent could not run the risk of permitting weapons or drugs to be introduced into an institution before taking action to prevent it (T.M. 378-79).

Dunbar stated that in the instant case a member of the department's classification staff had informed him that due to the circulation of petitions at Wallkill, there was a possibility of a confrontation between inmates of a different point of view, and a possibility of violence which warranted the transfer of certain inmates (T.M. 375-76). Dunbar said that upon respondent's transfer from Wallkill to Clinton, there was no directive that respondent be placed in segregation, or lose any good behavior allowances, or suffer any punishment or deprivation of privileges as a result of the transfer (T.M. 379).

Petitioner Butler testified on his own behalf. He stated that he began his career as a prison guard, and worked his way up to sergeant, lieutenant, assistant deputy superintendent, deputy superintendent, deputy commissioner in the correction department and Superintendent at Wallkill (46a-47a).

He said that Wallkill was a medium security institution with cells left open twenty-four hours per day, and a perimeter wire fence surrounding a portion of the facility (47a). He said that it had extensive academic and voca-

tional training programs, and many innovative programs that other institutions do not have (48a). He said that Wallkill did not have a special housing unit or an isolation wing, and that inmates were chosen to go there by the Wallkill staff, and did not have a right to go there (48a).

Butler stated that if there were hostilities between inmates, they would have to be transferred from Wallkill, whereas at maximum security institutions they would be placed in special housing for their own protection. He said that it would be impossible to isolate or segregate or control any section of the facility (49a). He said that during the eighteen months prior to trial, 59 inmates had been transferred from Wallkill to other institutions, eighteen of which were deemed unsuitable for the Wallkill program. He said that these cases involved some inmates who were engaged in homosexual activities, some inmates who refused to become involved in the Wallkill program, and one inmate who was involved in a serious fight (50a). He said that when inmates are transferred as unsuitable they are usually brought up on disciplinary charges, but that not all transfers were based on disciplinary offenses (50a-51a).

Butler said that he would not necessarily speak to an inmate prior to transfer, since it would depend on the purpose of the transfer (51a). He said that in an emergency situation a telephone call is made to the central office, and the central office generally accepts the request and determines which institution the inmate is sent to (52a). He said that the officers remove the inmate to the prison hospital while his belongings are packed and recorded on a transfer sheet, and then transport the inmate with his belongings to another facility. He said this procedure is followed to prevent inmates from barricading themselves in their cells or encouraging fellow inmates to assist them in preventing the transfer (53a).

With respect to the instant case, Butler said that on June 2, 1972 he received a telephone call at home, at 6:30

P.M., from an officer, who told him that a number of inmates were circulating a petition. Butler said that he was advised that there was no difficulty, and he told the officer not to interfere with the petition, but to keep the situation under observation and control (54a). Butler said that he received a second phone call one hour later, telling him that the inmate liaison committee members were very disturbed because they had learned that the petitions were purportedly being circulated as having been sponsored by them. Butler spoke to one of the committee members, who asked to address the inmates over the public address system, to advise them that the committee did not sponsor the circulation of the petitions. Butler heard the inmate's prepared statement over the phone, and then gave him permission to use the public address system (54a).

Butler said he received a third telephone call about one-half hour to one hour later, in which the officer advised him that unrest and tension had developed, and that there were loud arguments erupting in various parts of the institution. Butler ascertained that no fights had occurred and he told the officer to keep the matter under careful supervision and to let him know if anything developed (54a-55a). Nothing further happened that night, and the institution remained calm on the next two days, June 3 and 4, 1972 (55a).

On June 5, 1972, Butler asked a deputy superintendent to investigate the situation with respect to the union petitions, and the deputy reported that there was considerable tension, and that a group of inmates had been very vocal in their support of an inmate labor union, and the members of the inmate liaison committee were equally vocal in assuming that the union would detract from their authority or make their function useless (55a). On June 6, 1972, Butler called the central office and told them that there were a number of inmates who were creating a situation that could lead to trouble, and that he would like to transfer them to other facilities without disciplinary action.

Butler said that he was fearful that at the upcoming Saturday night movie, an argument or serious discussion might end up in a riot. Butler also directed a supervisory officer to be present at the weekly meeting of the inmate liaison committee, to insure that no trouble occurred there (55a, 57a).

Butler said that the assistant deputy superintendent reported to him that there were eight inmates, including plaintiffs, who were continuing to voice support for the inmate union, and that he was fearful that there may be trouble (57a). He said that he conferred with his staff and decided to transfer five of these men, who were active in support of the union (58a). Butler said that he did not normally oppose the circulation of petitions at Wallkill, but he was concerned about the union petition because of the attitude of the inmate liaison committee and other inmates against the petition (57a). He said that he did not confiscate the petitions or prevent them from leaving the institution (59a).*

With respect to the five inmates who were transferred, Butler did not institute any disciplinary proceedings against them, and did not cause them to lose any good time or to be placed in segregated confinement, or to be treated differently at the receiving institutions (58a). At the time of the trial, two of the five already had been paroled, as were various other inmates who had participated in the union activities (58a).

The District Court also had before it in evidence, a deposition of the Wallkill inmate who was in charge of the inmate liaison committee, Warren Barnes. (See Plaintiffs'

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* The petitions for the formation of a labor union (203a), were presented to the New York State Public Employees Relations Board, and rejected by that agency. See *Matter of Prisoners' Labor Union* v. *Helsby*, 44 A D 2d 707, 354 N.Y.S. 2d 694 (1974), amended 45 A D 2d 719 (1974), lv. to app. denied —— N Y 2d —— (1974).

Exhibit 28, T.M. 449-50). In this deposition Barnes stated that he was upset by the manner in which union petitions were circulated on June 2, 1972, because he believed that there was "a patent lie" involved in it, namely that the inmate liaison committee was sanctioning the petitions (Ex. 28, p. 116). Barnes said that he requested permission from petitioner Butler to use the institution's public address system because he wished to inform the inmate population that the liaison committee was not sponsoring the petitions (Ex. 28, 119-121). Barnes said that he and the other members of the liaison committee met with the inmates shortly afterwards to discuss the matter, and that twenty-five or thirty inmates were waiting for him, and another forty or so joined the group (Ex. 28, 123). He said that there was loud and lively discussion, but no violence (Ex. 28, 123-124). He said that subsequently he perceived no threats of violence as such in the institution, but that there was "continuing unrest" regarding the announcement of the liaison committee and the inmates' fear that they would get into difficulty because they had signed the petitions (Ex. 28, 130).

Summary of Argument

The transfer of inmates between state penal institutions is an area of prison management that should be left to the discretion of correctional administrators. Unlike disciplinary offenses which are based on acts of misconduct and violations of prison rules, transfers are based on an evaluation of an inmate's adaptation to an institution or program, or on the need to separate hostile inmates before confrontations take place. Transfers are part of the classification process and do not lend themselves to traditional due process procedures such as notice of charges or an opportunity to be heard. In many transfer cases there is a need for summary disposition by the prison authorities to avoid assaults on inmates or destruction of property. Where no

disciplinary punishment is imposed in connection with the transfer, the inmate does not suffer a grievous loss by being sent to another institution, since movement between institutions and parts of institutions is a routine concommitant of prison life. Transfers should be immune from the due process procedures that this Court has established for parole hearings and prison disciplinary proceedings involving substantial punishment. The orders of the courts below should be reversed on the law.

In addition the instant case was moot at the time the District Court rendered its decision and judgment. At the close of the trial respondent was returned to a medium security facility and restored to his previous job. The prison authorities had no intention of transferring him to another institution, and whether he would have been transferred in the future was entirely speculative. When the District Court decided the case the situation had been stable for ten months, and there was no longer a case or controversy.

ARGUMENT

POINT I

The Courts below erred in ruling that a prisoner who is transferred within a State from a medium security institution to a maximum security institution, without the imposition of disciplinary punishment, is entitled under the Due Process Clause to notice of charges and an opportunity to be heard.

This case presents significant issues concerning the application of the Due Process Clause to the administration of penal institutions. At issue in the direct sense is whether an inmate who is transferred between state institutions of different custody levels, is entitled to a due process hearing prior to or subsequent to the transfer. At issue in the broader sense is whether a prisoner who experiences a loss

of privileges but does not suffer disciplinary punishment, is entitled to due process guarantees. The resolution of these issues is necessary in view of this Court's decision in *Wolff* v. *McDonnell,* 42 U.S.L. Week 5190 (June 26, 1974), holding that inmates who faced a loss of good behavior allowances as a punishment for disciplinary offenses, were entitled to written notice of charges, an opportunity to call witnesses and present evidence at a hearing and a written statement by the disciplinary panel as to the evidence relied on and reasons for the disciplinary action. This Court noted that these procedures also would apply to the imposition of solitary confinement as a punishment, but stated that, "We do not suggest, however, that the procedures required by today's decision for the deprivation of good-time would also be required for the imposition of lesser penalties such as the loss of privileges." (42 U.S.L. Week at 5200, n. 19).

The transfers in the instant case did not result in either the imposition of disciplinary penalties or the loss of good behavior allowances. Rather they are an example of an administrative transfer, which is designed to protect the safety of an inmate and the security of an institution. What is involved is classification, not punishment, and a brief examination of the classification process will make it evident that transfers should remain a matter of complete administrative discretion.

One of the most important tools of prison management is the power to decide which institution an inmate should be incarcerated in. Virtually all prison systems have classification boards at receiving institutions which determine the facility that an inmate is best suited for. These determinations are based on the age of the inmate, the length of his sentence, the nature of his crime, the situs of the conviction, the educational and vocational level of the inmate, the availability of programs that are commensurate with his level, and the relative populations at the institu-

tions where the inmate might be sent. The classification board may also consider an inmate's past history at an institution under a previous sentence, the presence of former crime partners or enemies at an institution, and an inmate's cooperation with law enforcement agencies in providing confidential information about criminal activities.

The multifaceted aspect of these placement decisions makes it clear that they are based on professional expertise, and that they are ill-suited to the demands of due process. Thus an inmate does not have a right protected by the Due Process Clause, to be assigned to a prison of his choice, nor does he have a right to be incarcerated in a particular area of a state. One of the disabilities of a prison sentence is a loss of freedom of movement which which is enjoyed by an ordinary citizen. Even a parolee does not enjoy an unrestricted right to travel where he chooses. Cf. *Berrigan* v. *Sigler,* 499 F. 2d 514 (D.C. Cir. 1974).

The transfer of inmates between institutions within a system, must be viewed from the same perspective as the initial placement of inmates at institutions. Once an inmate has been assigned to a particular facility, there is no guarantee that his confinement will be beneficial or uneventful. One of the most serious problems facing penal administrators is the danger of assaults committed by prisoners on fellow prisoners. As Justice White noted in *Wolff* v. *McDonnell,* in rejecting the full range of parole revocation procedures for prison disciplinary hearings, many prisoners are "recidivists who have repeatedly employed illegal and often very violent means to attain their ends," and they "may have little regard for the safety of others or their property or for the rules designed to provide an orderly and reasonably safe prison life." (See 42 U.S.L. Week at 5197).

The recent case law illustrates that the danger of inmate assaults is no chimera. In *Bourgeois* v. *United States,* 375 F. Supp. 133 (N.D. Tex. 1974), the court awarded a total

of $40,000 in damages against the federal government because of the negligence of its employees in failing to prevent an assault by one inmate on another. In *Brown* v. *United States,* 374 F. Supp. 723 (E.D. Ark. 1974), the court awarded $500 in damages against the government because it failed to provide adequate protection for a federal prisoner in a county jail. In *Curtis* v. *Everette,* 489 F. 2d 516 (3rd Cir. 1973), the court held that three correctional employees would be liable for failing to prevent an attack by one inmate on another, which they had reason to believe would take place. In *Woodhous* v. *Virginia,* 487 F. 2d 889 (4th Cir. 1973), the court held that a prisoner has a right, secured by the Eighth and Fourteenth Amendments, to be reasonably protected from constant threat of violence and sexual assault by fellow inmates, and need not wait until he is actually assaulted to obtain relief.

See also *Gates* v. *Collier,* 501 F. 2d 1291, 1309 (5th Cir. 1974) (infliction of physical injuries on inmates is no less tolerable if committed by inmates with acquiescence of prison authorities, than if perpetrated by prison superintendent).

These cases make it clear to prison administrators that if they ignore threats to the safety of prisoners in their custody, they do so at the risk of being liable in money damages for failing to exercise their duty of care. See e.g. 18 U.S.C. § 4042 (Bureau of Prisons shall provide for the safekeeping, care and protection of persons in federal custody). In addition, it would be a callous and incompetent prison official who would wait for an assault to take place before acting to protect an inmate whose safety was threatened. A prison official must act expeditiously, and must err on the side of caution, in order to prevent an attack which may cause permanent injury to a prisoner.

One of the ways in which an inmate's safety can be protected is to place him in a different part of an institution, or in a different institution, where he can have no further

contact with a potential assailant. In the instant case, as petitioner Butler testified, it was not possible to separate inmates at Wallkill Correctional Facility by placing them in different portions of the institution, because Wallkill is a medium security facility with open galleries and easy access to all parts of the building. Thus the only way to avoid a potential confrontation at Wallkill is to transfer inmates to other New York State Correctional Facilities.

What has been said with respect to the protection of individual inmates, applies with greater force to the protection of groups of inmates who are struggling for power, and to the protection of entire institutions which are threatened by riots and strikes. Once again it would be a derelict prison warden who did not err on the side of caution, and did not remove suspected troublemakers before violence erupted. The problem of mass disruption is even more serious than the problem of individual assaults, since the danger to human life is greater, and the destruction of institutional property almost a certainty. See South Carolina Department of Corrections, *Collective Violence in Corectional Institutions,* 43-74 (1973), (history of prison riots from 1900-1971).

In addition to the prevention of assaults and destruction of property, there are other reasons for permitting prison administrators to have discretion in transferring inmates between institutions within a system. The power to transfer prisoners is essential to the establishment of effective rehabilitation programs and experimental projects. Many programs are initiated with the assumption that if the program is unsuccessful, the participants can be removed to other facilities with a minimum of difficulty. In like manner, if an inmate does not adapt to a program or if he acts in a manner which threatens prison security, he can be removed expeditiously to another facility, and replaced by a more deserving inmate. Finally, some transfers are necessitated by budget cuts and staff reductions, that make it

necessary to close down portions of institutions or to terminate special programs.

The magnitude of the transfer problem must be understood in addition to the reasons why transfers between institutions are necessary. In New York State there are six correctional facilities that are designated as maximum security institutions (Attica, Auburn, Clinton, Green Haven, Ossining and Great Meadow), eight correctional facilities or portions of correctional facilities that are designated as medium security institutions (Adirondack, Bedford Hills, Coxsackie, Elmira, Eastern, Fishkill, Tappan and Wallkill), six correctional facilities which are designated as minimum security institutions (Albion, Bayview, Edgecombe, Parkside, Rochester and Taconic), and four correctional camps which are designated as minimum security facilities (Pharsalia, Monterey, Summit and Georgetown). See 7 NYCRR Part 100, §§ 100.1-100.94. It is apparent that in a system with this many institutions of different security levels, and a total inmate population of approximately 15,000, the procedures ordered by the lower courts are going to impose a formidable administrative burden on the Department of Correctional Services, and a formidable burden on the federal courts that will inevitably be called upon to review these determinations.*

In recognition of the magnitude of the problem and the administrative difficulties that underlie transfers of inmates, the laws of many states and federal law empower correctional authorities to transfer adult felons between institutions at their discretion. See N.Y. Correction Law, § 23, *supra*, p. 2. A typical provision is found in 18 U.S.C. § 4802: "The Attorney General may designate as

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* The Department has advised the Attorney General that during 1973 there were 14,000 transfers between state institutions, and that during 1972 the total was approximately 9,800. The large increase is due to an expanded number of facilities, and increased use of medium and minimum security institutions. The totals for the first ten months of 1974 already exceed the 1973 totals.

a place of confinement any available, suitable and appropriate institution or facility . . . whether within or without the judicial district in which the person was convicted, and may at any time transfer a person from one place of confinement to another." Another example is found in Wisconsin statutory law: "Inmates of a prison may be transferred and retransferred to another prison by the Department" (Wisc. Stat. Ann., § 53.19 [1974 Supp.]). See Alaska Stat. § 33.30.120 (1972 Supp.); Mass. Ann. Laws Ch. 127, § 97; Neb. Rev. Stat. § 83-176 (1971 Vol.); N.J. Stat. Ann., § 30:4-85; Okla. Stat. Ann., Tit. 57, § 510 (1974 Supp.); Pa. Stat. Ann., Tit. 61, § 78; Vt. Stat. Ann., Tit. 28, § 702 (1974 Supp.); Va. Code § 53-8. See also So. Dak. Comp. Laws § 24-6-6 and Ky. Rev. Stat. § 197.065, which authorize transfers of inmates between prisons and reformatories.

These statutes reflect a collective legislative judgment that transfers of inmates between penal institutions should be left to the unfettered discretion of prison administrators. Stated another way, these statutes recognize that an inmate does not have a right to be assigned to a particular prison, or to protest if he is removed from an institution which he prefers. The policies underlying this legislative judgment, should also govern the analysis of the due process issue in the instant case.

It is axiomatic under the Due Process Clause, that the process which is due to an aggrieved party is a function of the exigencies of a situation and the loss which he may suffer. A classic formulation of this principle appears in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), where this Court stated:

> "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (Frankfurter, J., concurring), and

depends upon whether the recipient's interest in avoiding that loss outweights the governmental interest in summary adjudication. Accordingly, as we said in Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961). 'Consideration of what procedures due process may require under any set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.'" (397 U.S. at 262-63).

As a result of this principle a parolee does not receive the same protections at a parole proceeding as a person accused of a crime receives at a trial, and a parolee does not receive the same safeguards at a preliminary hearing that he receives at a final revocation hearing. *Morrissey* v. *Brewer*, 408 U.S. 471 (1972). In like manner a prisoner facing a loss of good behavior allowances does not receive the same protections as a parolee facing a loss of liberty. *Wolff* v. *McDonnell, supra.* See also *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973) (right to counsel at parole and probation revocation hearings is not governed by fixed rule, but depends on facts of individual cases). Applying these concepts to the instant case, and weighing the government's need for summary adjudication against the loss suffered by the aggrieved party, it becomes clear that the lower courts erred in applying due process procedures to intrastate transfers, that were unaccompanied by disciplinary punishments.

At the outset it is noteworthy that transfers are one area of penal administration where giving an inmate notice of charges and an opportunity to be heard, may be detrimental to institutional safety and security. At the trial, petitioner Butler and Deputy Commissioner Dunbar, both of whom were experienced correctional administrators, testified that inmates are never told in advance that they are being removed from an institution. This is to prevent

them from barricading themselves in their cells or arousing other inmates to oppose the transfer. To afford an inmate notice of charges and an opportunity to be heard before being sent to another facility, might well create the assault or disturbance that the transfer was designed to prevent. Furthermore the transfer might be based on confidential information which could not be made known at a due process hearing. In *Morrissey* v. *Brewer, supra,* and *Wolff* v. *McDonnell, supra,* this Court recognized that even a parolee who was facing a loss of liberty or a prisoner who was facing disciplinary punishment, was not entitled to be informed of all of the evidence against him, if there was a need for confidentiality.

In addition to transfers based on security considerations, there are also transfers based on intangible considerations such as a warden's professional judgment that an inmate is not benefiting from the programs in an institution, or a warden's judgment that an inmate is a troublemaker who is stirring up dissension among other inmates and guards. While these factors cannot be the basis of disciplinary punishment, they should be the basis of allowing a warden to decide whether an inmate should remain at an institution. Unlike acts of misconduct and discrete rule violations which can be set forth in disciplinary charges and adjudicated at hearings, the intangible factors upon which a warden may wish to transfer an inmate do not easily lend themselves to "notice of charges" or an opportunity to be heard. Holding a hearing at the receiving institution rather than the sending institution, after the transfer has been completed, does not alleviate the fundamental inappropriateness of conducting such hearings, and creates the added problem of transmitting witnesses and records to an institution that may be far away from the sending institution.

An analysis of the loss suffered by an inmate in a transfer situation which is not accompanied by disciplinary punishment, also leads to the conclusion that due process

procedures are not required. As we noted above, a prison inmate suffers certain disabilities as a result of being committed to an institution for the service of his sentence. See *Price* v. *Johnston*, 334 U.S. 266 (1948). In addition to a loss of freedom of movement, these disabilities include a lesser degree of protection at a disciplinary hearing than a parolee receives at a revocation hearing or a criminal defendant receives at a trial, *Wolff* v. *McDonnell, supra;* a qualified right to receive correspondence or literature that may be restricted by an important governmental interest that is unrelated to the suppression of expression, *Procunier* v. *Martinez*, 416 U.S. 396 (1974); and a limited right to meet with members of the press, that may be restricted when alternative means of communication are available, *Pell* v. *Procunier*, 42 U.S.L. Week 4998 (June 24, 1974); *Saxbe* v. *Washington Post Co.*, 42 U.S.L. Week 5006 (June 24, 1974). See also *Richardson* v. *Ramirez*, 42 U.S.L. Week 5016 (June 24, 1974) (disenfranchisement of felons who have completed their sentences does not violate the Fourteenth Amendment).

The loss of privileges that an inmate may experience when he is transferred between penal institutions, or when he is removed from a particular program at an institution, or when he is transferred from one part of an institution to another part of an institution, is a concomitant of prison life that results from the status of incarceration. If the courts were to recognize a right protected by the Due Process Clause to every educational program, training program or recreational program that was valued by a prisoner, it would be impossible to administer correctional institutions without conducting hearings on virtually every decision that affects a prisoner's daily life.* We do not believe that

* The Court of Appeals for the Second Circuit has since ruled in another case that an inmate who is transferred between maximum security facilities is also entitled to a due process hearing. See *Montanye* v. *Haymes*, No. 74-520 (Certiorari petition pending).

the Due Process Clause was intended to have this function, but rather it was intended to protect inmates against grievous losses and more substantial invasions of their liberties.

In the instant case the trial testimony of respondent Newkirk indicated that he suffered some disadvantage in connection with all of his transfers between various state facilities. When he was transferred from Green Haven Correctional Facility to Auburn Correctional Facility, at his own request, he was not able to see his family as frequently. When he was transferred from Ossining Correctional Facility to Attica Correctional Facility, not at his request, he also saw his family less frequently. When he was transferred from Auburn Correctional Facility to Wallkill Correctional Facility, at his request, he initially received a lower paying job at Wallkill. These examples are but a few of the myriad ways an inmate may experience some deprivation when he is sent from one institution to another, regardless of the level of custody.

The trial testimony also indicated that after the disputed transfer from Wallkill Correctional Facility to Clinton Correctional Facility on June 8, 1972, Newkirk ultimately earned the same wage at Clinton that he earned at Wallkill, and ultimately obtained a job at the Superintendent's house which took him out of the institution each day. The record below also indicates that three of Newkirk's co-plaintiffs were paroled after the disputed transfers, thus making it clear that the transfers had no adverse parole consequences.

Bearing all of this in mind, we believe that this Court should rule as a matter of law that the intrastate transfers in the instant case, which were not accompanied by disciplinary punishments, did not constitute a sufficiently grievous loss to warrant the application of the Due Process Clause. Rather this Court should hold that the transfers at issue in this case do not fall within the coverage of the *Wolff* and *Morrissey* decisions. In this respect we believe that the rule which this Court should adopt is illustrated

in *Bundy* v. *Cannon*, 328 F. Supp. 165 (D. Md. 1971), a case involving the transfer of prisoners from minimum and medium security institutions, to a maximum security prison as a result of a work stoppage.

In *Bundy* the court held that insofar as the transferred inmates were placed in solitary confinement at the receiving institution, they were entitled to the same due process procedures that they would have received if they were placed in solitary confinement at the sending institution. However, with respect to the change in custody level between the sending institutions and the receiving institution, the court held that this did not raise a constitutional issue:

> "A prisoner has no vested right to be assigned to or to remain in a medium security or a minimum security institution. The Division of Correction has the right to transfer prisoners from one institution to another, whether to a higher, equal or lower security status, for administrative, therapeutic, adjustment or other reason, without the need for a hearing under those procedures." (328 F. Supp. at 173)

The *Bundy* approach is a sensible one because it protects an inmate's right not to be arbitrarily punished, but recognizes that an inmate has no right not to be transferred between penal institutions. The error of the lower court rulings in the instant case is that they established an inmate's right, which is protected by the Due Process Clause, to remain at a particular facility. We believe that these rulings are unsound from the point of view of prison management, because they will diminish the effectiveness of programs utilizing medium and minimum security facilities, and because they give too much weight to the loss of privileges which are routinely experienced in prison life.

This Court should reverse the decisions of the lower courts, and rule that transfers within a state, without the

imposition of disciplinary punishment, are not governed by the due process procedures set forth in *Wolff* v. *McDonnell, supra,* and do not require advance notice or an opportunity to be heard.

POINT II

The Courts below also erred in not dismissing respondent's case as moot. At the time the District Court decided the case there was no longer a live controversy between the parties.

In its recent decisions this Court has expressed concern that the litigants before the Court satisfy the "case and controversy" requirement of Article III of the Constitution. In *De Funis* v. *Odegaard,* 416 U.S. 312 (1974), a majority of this Court held that a student's imminent graduation from law school, rendered moot his challenge to admissions policies of the law school which were allegedly discriminatory. In *O'Shea* v. *Littleton,* 414 U.S. 488 (1974), this Court held that a challenge to the practices of two state judges did not present an actual case or controversy because the petitioners were not facing imminent prosecutions for violations of state laws. In *Spomer* v. *Littleton,* 414 U.S. 514 (1974), this Court remanded an action against a state's attorney to the lower federal courts, for consideration of whether the appointment of a successor state's attorney rendered the case moot. In *Foley* v. *Blair & Co., Inc.,* 414 U.S. 212 (1973), this Court remanded a bankruptcy case to the lower federal courts to determine whether in light of the confirmation of Chapter XI arrangements involving a brokerage firm, there remained a live controversy concerning the appointment of a liquidator and the priority of attorney's fees. See also *Morgan* v. *Gilligan,* 413 U.S. 1 (1973) (Some basis exists for conclusion that case is moot due to changed circumstances, but case dismissed on grounds of non-justiciability of questions presented). But see *Richardson* v. *Ramirez,* 42 U.S.L. Week

5016 (June 24, 1974) (action challenging disenfranchisement of ex-felons is not moot, although three individual parties were subsequently permitted to register to vote); *Super Tire Engineering Co.* v. *McCorkle,* 416 U.S. 115 (1974) (settlement of strike did not render moot the issue of whether striking employees were entitled to public assistance benefits); *Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974) (challenge to zoning ordinance was not rendered moot by named parties moving to different residences).

In the instant case, we believe that a proper application of the principles enunciated by this Court, should have compelled the lower courts to have dismissed respondent's case as moot. At the time the District Court rendered its decision (October, 1973), respondent had been returned to Wallkill Correctional Facility, and had been there for ten months without any significant incidents. In his affidavit in support of dismissal on grounds of mootness, petitioner Butler affirmed that respondent would be treated "fairly", and would "not be subjected to any vindictive or retributive action as a consequence of his having been a party to this lawsuit" (223a). In addition, petitioner Butler caused a memorandum to be placed in respondent's file which explained the administrative nature of the transfer, and indicated that the transfer was not accompanied by disciplinary charges and was not to have any bearing on future determinations by the Board of Parole or the time allowance committee. While respondent later contended that the memorandum did not meet with his complete approval, this Court can determine for itself whether the memorandum was sufficiently neutral to obviate the need for further relief (See page 256a).

Finally, there were no outstanding disciplinary charges pending against respondent at the time the District Court rendered its decision, and no plans by petitioners to transfer respondent after the case was decided. Respondent

had been restored to his truck driving job at Wallkill, which is the job he held prior to the transfer, and he had not been subjected to any restrictions or loss of privileges as a result of the disputed events.

In light of these circumstances the lower courts should have dismissed the action as moot, particularly since the Court of Appeals decision was rendered six weeks after this Court's decision in *DeFunis* v. *Odegaard.* The issue in this case is not one that will evade review because there is currently a conflict in the lower federal courts concerning the procedures that must be followed in interstate and intrastate transfer cases. (See our petition for certiorari at pages 14-15). Moreover, as we have noted, the Court of Appeals has since decided in *Montanye* v. *Haymes, supra,* No. 74-520, that an inmate who is transferred between maximum security facilities is also entitled to a due process hearing.

The instant case is not a class action and involves only the rights of respondent Newkirk. Like the law student in *DeFunis* who faced only a remote possibility that he would be subjected to future admissions policies that allegedly violated his constitutional rights, respondent Newkirk was faced with only a possibility that at some future time, some unforeseen circumstances would warrant his removal to another institution. We do not believe that this was an adequate basis for granting relief on his behalf.

CONCLUSION

The decisions below should be reversed as a matter of law, or in the alternative vacated as moot.

Dated: New York, New York, December 10, 1974.

Respectfully submitted,

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